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10 Attorneys for Plaintiff
11 EMECO INDUSTRIES, INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 EMECO INDUSTRIES, INC.
16 Plaintiff,

17 v.

18 RESTORATION HARDWARE, INC., GARY
19 FRIEDMAN, and DOES 1-10.

20 Defendants.

CASE NO. CV 12-05072 MMC
**PLAINTIFF'S NOTICE OF
SUPPLEMENTAL NINTH CIRCUIT
AUTHORITY IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Date: December 14, 2012
Time: 9:00 a.m.
Courtroom: 7
Judge: Honorable Maxine M. Chesney

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1 Plaintiff Emeco Industries, Inc. (“Emeco”) respectfully provides the Court with
 2 supplemental Ninth Circuit authority in support of its motion for a preliminary injunction.

3 As noted in Emeco’s Reply, under Ninth Circuit law Defendants’ examples of similar
 4 third-party use are insufficient to establish genericness, and indeed, an infringer cannot defend its
 5 conduct by pointing to other infringing uses. *See* Reply at 2-5. As additional Ninth Circuit
 6 authority for this rule, Emeco cites *National Lead Co. v. Wolfe*, 223 F.2d 195 (9th Cir. 1955).
 7 There, the holder of the “Dutch Boy” registered mark covering its paint products claimed that a
 8 party’s use of the phrases “‘Dutch’, ‘Dutch Paint Company’ and ‘Dutch Paint’” infringed its
 9 mark. *Id.* at 197. In asserting a genericness defense, the alleged infringer pointed to 39 uses of
 10 the word “Dutch” by third-party paint sellers and manufacturers. In reversing the district court,
 11 the Ninth Circuit rejected the defense and ordered entry of an injunction on remand. *Id.* at 204-05
 12 (finding that 39 third-party uses of the word “Dutch” was “no evidence” that the mark was a
 13 “generic term,” in part given that “some of these third persons may also have been guilty of
 14 wrongful infringement [which] would not be a defense or justification for the [alleged infringers].
 15 It is no excuse for them to say that others have been guilty of the same wrong.”).

16 DATED: December 6, 2012

17 MUNGER, TOLLES & OLSON LLP

18 By: _____ /s/ *John W. Spiegel*
 19 JOHN W. SPIEGEL

20 Attorneys for Plaintiff Emeco Industries, Inc.

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